No. 92-8556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the district court properly considered petitioner's prior uncounseled misdemeanor conviction in computing his criminal history score under the Federal Sentencing Guidelines.

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases addressing the right to counsel and the due process of law in criminal proceedings.

STATEMENT OF THE CASE

On April 25, 1983, petitioner Kenneth O. Nichols was convicted in Georgia of the misdemeanor of driving while intoxicated. Ga. Code Ann. §40-6-391 (1983). He pleaded *nolo contendere* and, on May 2, 1983, was sentenced to a pay fine of $250 and to attend DUI school.[2]

On April 1, 1991, in the Eastern District of Tennessee, petitioner was sentenced on his plea of guilty to the federal offense of possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. §846. In calculating his sentence under the United States Sentencing Guidelines (U.S.S.G.), the district court added one point to defendant's criminal history for the Georgia misdemeanor conviction, as required by the Guidelines, U.S.S.G. §4A1.2, comment (1990). *See* PSR at 7. The base offense level for petitioner's conviction was calculated to be Offense Level 34. Adding the one point for this misdemeanor conviction to three other criminal his-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Presentence Report (PSR) at 7. The Joint Appendix was not available at the time this brief was written. Citations are to documents in the record below.

tory points (for a previous 30 month sentence for possession with intent to distribute marijuana) moved petitioner from Criminal History Category II, where the sentencing range available would have been 168-210 months, to Criminal History Category III, where the available range was 188-235 months. *See* U.S.S.G. §5A (1990). Petitioner was sentenced to 235 months, the top of the designated range.

The district court considered and rejected petitioner's argument that use of this prior misdemeanor conviction was unconstitutional because petitioner had been unrepresented by counsel and did not waive the right to counsel. *See* Memorandum Decision at 4-5 (Apr. 29, 1991).[3] Petitioner appealed this decision to the Sixth Circuit Court of Appeals, which affirmed the district court, *United States v. Nichols*, 979 F.2d 402 (1993), and this Court granted *certiorari*.

SUMMARY OF ARGUMENT

Because the right to counsel is often necessary to guarantee the reliability of criminal convictions, this Court has prohibited the imposition of the severe sanction of imprisonment on defendants who were uncounseled and did not waive their right to counsel, even in misdemeanor cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). This principle has already

[3] According to the presentence report, the Georgia court records did not reflect whether the defendant was represented by an attorney. PSR at 7. The probation officer quoted petitioner as stating that he had consulted an attorney and had been told that he did not need counsel to plead *nolo contendere* to this offense. *Id.* The district court found it to be conceded that petitioner had not been represented by counsel at that proceeding, and further found "on the basis of the facts before [the court]" that petitioner had not waived his right to counsel. Memorandum Decision at 1-5.

been held to render unconstitutional use of an uncounseled misdemeanor conviction to automatically enhance a sentence of imprisonment imposed upon a subsequent conviction. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

Despite the fact that *Baldasar* provided no majority rationale, the plurality opinions in that case may be fairly read together, under the principles of *Marks v. United States*, 430 U.S. 188, 193 (1977), as holding either: (1) that automatically increasing a prison term under an enhancement statute based on a prior uncounseled misdemeanor conviction is impermissible if that conviction was for an offense punishable by at least six months' imprisonment; or (2) that any automatic imposition of incarceration on the basis of an uncounseled and therefore presumptively unreliable conviction is impermissible regardless of the maximum authorized sentence for the first offense. The latter rule, in our view, is more consistent with both the concern for reliability expressed in *Argersinger* and the concern for federalism expressed in *Scott*. However, under either interpretation of *Baldasar*, the decision below is wrong and should be reversed.

Sentencing under the Federal Sentencing Guidelines (U.S.S.G. 1992) amounts to an automatic imposition of an increased range of imprisonment, within the meaning of *Baldasar*, because the decision of how to evaluate a defendant's criminal history is not discretionary. *See Burns v. United States*, 501 U.S. ___, ___, 111 S.Ct. 2182, 2191-92 (1991) (Souter, J., dissenting). Therefore, in addition to violating petitioner's Sixth and Fourteenth Amendment right to counsel, reliance by the United States on petitioner's uncounseled misdemeanor conviction constitutes a denial of due process under the Fifth Amendment because it subjected petitioner to a sentence based on unreliable information. *Townsend v. Burke*, 334 U.S. 736 (1948).

ARGUMENT

I. RELIANCE ON PETITIONER'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN COMPUTING HIS CRIMINAL HISTORY UNDER THE FEDERAL SENTENCING GUIDELINES VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL

A. The Sixth Amendment, As Interpreted In *Baldasar v. Illinois*, Prohibits The Automatic Imposition Of Any Period Of Incarceration On The Basis Of A Prior Conviction Obtained In The Absence Of Counsel Or A Valid Waiver Of Counsel

The right to counsel, as this Court has long recognized, is often essential to guarantee the fairness of criminal proceedings, regardless of whether those proceedings concern capital offenses, felonies, or misdemeanors. For example, in *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938), the Court said:

> [The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

In the landmark case of *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), the Court declared that:

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . [A layman] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

It is for these reasons that the Court has interpreted the Sixth Amendment and the Due Process Clause to provide for a right to counsel where a defendant is tried for a felony, *Gideon v. Wainwright*, 372 U.S. 335, or even for a petty misdemeanor, *Argersinger v. Hamlin*, 407 U.S. 25. As the Court clarified in *Scott v. Illinois*, 440 U.S. 367, the chief evil these cases seek to prevent is the incarceration of defendants who have not had the benefit of the guiding hand of counsel. Interpreting the Court's assertion in *Argersinger* that "no imprisonment may be imposed . . . unless the accused is represented by counsel," 407 U.S. at 40, the Court in *Scott* explained the underlying rationale of *Argersinger* by noting that incarceration is "so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant has been offered counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." 440 U.S. at 372-73.

Under *Scott*, petitioner Nichols' uncounseled misdemeanor conviction for driving while intoxicated could not constitutionally have been used as the basis for a sentence of imprisonment of even one day. Yet eight years later, the United States used that uncounseled conviction as the basis for a twenty-five month enhancement of petitioner's sentence for a different offense. *Scott* and *Argersinger* have already been interpreted by this Court, in *Baldasar v. Illinois*, 446 U.S. 222, to prohibit such a result.

Baldasar presented this Court with a set of facts remarkably similar to petitioner's.[4] In 1975, Thomas Bal-

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[4] This account is derived from the opinion of the Court in *Baldasar*, *id.*, and from petitioner Baldasar's brief in that case.

dasar was charged under Illinois law with petty theft, an offense punishable by up to one year imprisonment. He pleaded guilty and was sentenced to pay a fine of $159 and to serve one year on probation. He did not have the benefit of counsel at that proceeding, and the record showed no affirmative waiver of counsel. Later that year, Baldasar was again charged with petty theft, convicted, and sentenced to one to three years rather than a maximum of one year, because his prior uncounseled misdemeanor conviction was considered under a state enhancement statute.

Like Baldasar, petitioner Nichols was convicted upon his own plea (*nolo contendere*) of a misdemeanor (driving while intoxicated) punishable by up to one year imprisonment, *see* Ga. Code Ann. §40-6-391(c)(1983), and was sentenced to pay a fine. He was unrepresented by counsel in that proceeding and the record reflects no affirmative waiver of counsel. When petitioner was convicted of the instant federal offense, his uncounseled misdemeanor conviction was used as the basis for a sentence enhancement under the Federal Sentencing Guidelines, of 25 months an even longer period than Baldasar would have served as a consequence of his prior conviction had the Court not found this use of his prior conviction unconstitutional.

In *Baldasar*, the Court unequivocally held that later imposition of incarceration on the basis of Baldasar's uncounseled misdemeanor conviction was as impermissible as a sentence of incarceration immediately following upon that conviction would have been. However, there was no opinion of the Court in *Baldasar* setting forth a majority rationale; the decision comprises a brief *per curiam* opinion with concurring opinions by Justices Stewart, Marshall and Blackmun. Because these concurrences provide more than one explanation for the *Baldasar* holding, a number of state and federal courts have differed on how broadly to interpret the rationale of that

decision. Petitioner submits, and *amicus* agrees, that this case falls squarely within even the narrowest plausible reading of the holding of *Baldasar*.[5] But because of the confusion in the lower courts, *amicus* urges the Court to go beyond the narrow ruling that would decide petitioner's case in order to clarify the scope of the holding of *Baldasar*.

1. *Baldasar* Prohibits Imposition Of A Period Of Incarceration Directly Attributable To A Prior Uncounseled Misdemeanor Conviction

Under *Marks v. United States*, 430 U.S. 188, when no single rationale explaining the result of a decision commands the votes of five Justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Id.* at 193, citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988). The rule of *Marks* is sometimes described as requiring later courts to find the "least common denominator" of a decision. *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 n.5 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). There are several significant principles on which the five Justices of the majority in *Baldasar* agreed.

a. *Baldasar* Rejects The Argument That A Sentence Enhancement Is Attributable Only To The Instant Offense, And Not To The Predicate Offense

One common denominator for the decision in *Baldasar* is easily located by looking at arguments made by Illinois as respondent and the United States as *amicus curiae* in that case, which were decisively rejected by five members of the Court. Baldasar argued that without re-

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[5] *See* Point IA2 *infra*.

liance on the prior misdemeanor conviction, he could not have been sentenced to more than one year of incarceration; with the misdemeanor viewed as a predicate conviction, he was sentenced to one to three years. Therefore, he argued that the additional two year sentence was attributable to the uncounseled conviction. Petitioner's Brief at 11-14, 17. Illinois and the United States both argued that the additional two years were attributable solely to the conviction upon which they were imposed. Respondent's brief at 14-15; United States brief at 8-9. According to this argument, the validity of the first conviction was not an issue because the entire period of incarceration was imposed as punishment for the subsequent offense, not as punishment for the earlier offense.

The *Baldasar* dissenters accepted this argument, *see* 446 U.S. at 233-34, but the five Justices in the majority all implicitly or explicitly rejected it. Justice Stewart thought it plain that, but for the first conviction, petitioner would not have been subjected to the additional incarceration after his second conviction. *Id.* at 224. Justice Marshall, joined by Justices Brennan and Stevens, also viewed the enhancement as "solely because" of the previous conviction, *see id.* at 227. "That [Baldasar] has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer." *Id.* at 226. Justice Blackmun, whose opinion was preceded by both of these concurrences, did not explicitly discuss his view on this issue, but had he agreed with the dissenters on this point, there would have been no cause for him to consider under what circumstances Baldasar's first conviction should have been deemed valid. *See id.* at 229-30.

Some of the lower courts to have addressed the question have correctly found that the *Baldasar* opinion has the force of *stare decisis* at least as to this ruling. *See, e.g., Moore v. Jarvis*, 885 F.2d 1565, 1572 (11th Cir. 1989)("The common rationale of the three concurring

opinions constituting the holding was that the period by which the sentence for the subsequent conviction was increased actually was attributable to the prior, uncounseled conviction"). It is also clear that this conclusion was required by previous case law. If the reliability or validity of predicate convictions is not relevant at sentencing, then the status of a predicate conviction should not matter even if the predicate is an uncounseled felony conviction. In *Burgett v. Texas*, 389 U.S. 109 (1967), however, the Court had held that a prior uncounseled felony conviction may not be used to enhance a defendant's punishment under a recidivist statute. Because Burgett had been denied his right to counsel in the prior proceeding, the Court found that he "in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.* at 115.

b. *Baldasar* Holds That An Uncounseled Misdemeanor Conviction Is Insufficiently Reliable To Provide A Predicate For The Automatic Imposition Of A Period Of Imprisonment

All five Justices in the *Baldasar* majority also agreed that an uncounseled conviction that is insufficiently reliable to provide a basis for a sentence of incarceration is also insufficiently reliable to form a basis for a subsequent automatic enhancement of a sentence of imprisonment.[6] Justice Marshall's opinion speaks to this issue

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[6] As some lower courts have said, "[t]he consensus of these [*Baldasar*] concurrences is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment." *United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990); *see also United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991); *Panenen v. State*, 711 P.2d 528, 532 (Alaska 1985); *State v. Oehm*, 680 P.2d 309 (Kan.Ct. App. 1984); *State v. Armstrong*, 332 S.E.2d 837, 841 (W.Va. 1985).

most articulately:

> We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' *Powell v. Alabama* . . . his conviction is not sufficiently reliable to support the severe sanction of imprisonment. *Argersinger v. Hamlin* . . . . An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense.

446 U.S. at 227-28 (citations omitted).

Justice Stewart's and Justice Blackmun's concurring opinions are just as firmly, albeit not as vocally, based on *Argersinger*'s concern that the absence of counsel undermines the reliability of a conviction. Justice Stewart, who had concurred in both *Argersinger* and *Scott*, thought it so obvious that the use of the uncounseled conviction in *Baldasar* violated the rules of those cases that he felt no need to reiterate the basis for the decision in *Argersinger*: that the assistance of counsel is "often a requisite to the very existence of a fair trial." *Argersinger*, 407 U.S. at 31; *see also id.* at 33-37. To show how ineluctable this conclusion was, he simply noted that the State of Illinois had itself acknowledged in its brief in *Scott* that if an uncounseled conviction could not be used as a basis for a sentence of imprisonment, it also would be unavailable for use as a predicate in subsequent proceedings. *Baldasar*, 446 U.S. at 224 n.*. Justice Blackmun's concern about the unreliability of the uncounseled conviction, tracing back to his dissent in *Scott* and his participation in *Argersinger*, was so great that he would not even have permitted the misdemeanor convictions at issue in *Scott* or in *Baldasar* to be used as the basis for imposition of a fine. Justice Blackmun adhered to his conclusion in *Scott* that the Sixth and Fourteenth Amendments require

the states to provide counsel to any defendant prosecuted for a crime with a possible penalty of six months or more, regardless of whether the defendant was actually imprisoned.

It is ironic that some lower courts have interpreted Justice Blackmun's opinion, which in some respects is far broader than the other concurrences, as the "narrowest" under the *Marks* analysis.[7] It is even more ironic that a few courts have suggested that Justice Blackmun's different idea about the extent of the states' obligation to provide counsel in misdemeanor cases deprived *Baldasar* of any common rationale.[8] The court below, for example, concluded that because Justice Blackmun had a different explanation for *why* petitioner's misdemeanor conviction was too unreliable to form a basis for any sentence of

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[7] *Baldasar* has posed a real challenge to those courts that try to follow *Marks* by seeking the "narrowest" and "broadest" opinions because, unlike the situation in *Marks* itself or in *Gregg v. Georgia*, 428 U.S. 153, it is awkward to characterize the *Baldasar* opinions by their breadth, or by the number of cases likely to be affected. It is impossible to predict how many misdemeanor prosecutions Justice Blackmun's *Scott* rule would affect and whether this number is larger or smaller than the number of enhancement decisions other opinions would affect.

For such reasons, most commentators have criticized the exclusive focus on how "narrow" an opinion is and advocated that *Marks* be interpreted more broadly in order to serve the goals of *stare decisis* in a wider range of cases. *See, e.g.*, Ken Kimura, Note, "A Legitimacy Model for the Interpretation of Plurality Decisions," 77 Cornell L. Rev. 1593 (1992); Mark Alan Thurmon, Note, "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions," 42 Duke L.J. 419 (1992); Linda Novak, Note, "The Precedential Value of Supreme Court Plurality Decisions," 80 Colum. L.Rev. 756, 760-61 (1980).

[8] *See United States v. Eckford*, 910 F.2d 216, 219 (5th Cir. 1990). The Ninth Circuit, which *Eckford* quoted as having said, in *dicta*, that "[t]he court in *Baldasar* divided in such a way that no rule can be said to have resulted," *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981), discovered much common ground in *Baldasar* in later decisions. *See supra* note 6 .

imprisonment, and because this explanation was grounded in a dissenting view of a Supreme Court precedent, Justice Blackmun's conclusion as well as his reasoning could be ignored. 979 F.2d at 415. This procrustean reading disregards the result Justice Blackmun reached in *Baldasar* -- the automatic sentencing enhancement was unconstitutional -- as well as his starting point -- concern about the fairness of uncounseled proceedings -- merely because he presented a different intermediate step in his reasoning about how best to accomplish the goals of *Argersinger*.

Under well-recognized principles of *stare decisis*, Justice Blackmun's difference of perspective should provide no justification for the blatant disregard of *Baldasar* shown by some lower courts (particularly the Fifth Circuit)[9] or for the decision of the court below to follow the *Baldasar* dissent instead of the majority.[10] In *Gregg v. Georgia*, 428 U.S. at 169 n.15, where the Court first applied the plurality opinion theory articulated in *Marks*, the Court found a binding holding based on the "narrower" theories of a three-Justice plurality in *Furman v. Georgia*, 408 U.S. 238 (1972), despite the fact that the "broader" and "narrower" opinions in that case were based on wholly different constitutional theories.

To serve the goals of *stare decisis* theory -- clarity, predictability and consistency of decisions -- lower courts, and even the Supreme Court itself, should look beyond the surface of plurality opinions to try to locate common ground. Respect for *stare decisis* sometimes requires a court to analyze the conclusions implicit in plurality opinions by considering which principles or arguments each Justice accepted or rejected. *See, e.g., Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 82 (1992); *Student Public Interest Research Group of N.J. v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3d Cir. 1988); *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981), *cert. denied sub nom. Miller v. United States*, 458 U.S. 1110 (1982). Had the court below not taken such a cramped view of *stare decisis*, it would have been clear that there is enough common ground in *Baldasar* to cover petitioner's case. The question now confronting the Court is which approach to select in explaining *why* petitioner's case is within that common ground.

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[9] The Fifth Circuit continued to follow its own pre-*Baldasar* case law, *see Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979), even after *Baldasar* was decided, sometimes neglecting even to cite *Baldasar* in relevant cases, *see Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981); *United States v. Smith*, 844 F.2d 203 (5th Cir. 1988), and sometimes barely acknowledging the existence of the Court's decision while distinguishing it away, *see Wilson v. Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). This attitude became Fifth Circuit precedent, *see Eckford*, 910 F.2d at 220, which then influenced some other circuits which had not yet interpreted *Baldasar*. *Compare United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991), *cert. denied*, __ U.S. __, 113 S.Ct. 1250 (1993)(adopting limiting Fifth Circuit reading of *Baldasar*) *with United States v. Norquay*, 987 F.2d 475, 482 (8th Cir. 1993)(adopting a broader reading of *Baldasar*).

[10] The court below followed the Fifth Circuit in reasoning that a prior misdemeanor "valid" for the purposes for which it was used at the time is "valid" for all other purposes, 979 F.2d at 416; *see Eckford*, 910 F.2d at 220. This is not a narrow reading of *Baldasar*, but acceptance of the dissenting position. *See Baldasar*, 446 U.S. at 232-34.

Most of the cases in which the lower courts have questioned the (continued...)

[10] (...continued)
scope of *Baldasar* have, in fact, been cases where *Baldasar* was distinguishable and the courts were trying to elicit a rationale in order to decide questions *Baldasar* does not answer. One set of cases considers whether to apply the *Baldasar* rule to prior adjudications which were not criminal convictions. *See, e.g., Schindler*, 715 F.2d 341 (uncounseled result in civil forfeiture proceeding); *Robles-Sandoval*, 637 F.2d 692 (deportation order). Another set of cases considers whether any other collateral use of uncounseled convictions should be permitted. *See, e.g., Charles v. Foltz*, 741 F.2d 834 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985)(impeachment).

2. Under The Narrowest Interpretation Of *Baldasar*, Petitioner Has Been Denied His Right To Counsel Because The Uncounseled Conviction That Precipitated An Additional Period Of Incarceration Was For A Misdemeanor With A Possible Sentence Of More Than Six Months Imprisonment

A number of lower courts, taking a result-oriented approach to *stare decisis*, have concluded that the least common denominator of the *Baldasar* opinions derives from combining Justice Blackmun's concurring opinion with the opinions of the other four Justices in the majority. *See, e.g., United States v. Falesbork*, __ F.3d __, 1993 WL 331481 at 3 (4th Cir. 1993); *Santillanes v. United States Parole Commission*, 745 F.2d 887, 889 (10th Cir. 1985); *Bilbrey v. State*, 531 So.2d 27, 32 (Ala.Crim.App. 1987); *State v. Beach*, 592 So.2d 237, 239 (Fla. 1992); *State v. Orr*, 375 N.W.2d 171, 176 (N.D. 1985); *cf. State v. Novak*, 318 N.W.2d 364, 368 (Wis. 1982). Under this approach, *Baldasar* is read to "prohibit an increased prison term under an enhanced penalty provision when it is based upon a prior uncounseled misdemeanor conviction that either resulted in the defendant's imprisonment or was obtained for an offense punishable by more than six months' imprisonment." David S. Rudstein, "The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U.Fla.L.Rev. 517, 535 (1982).

While *amicus* disagrees that this interpretation is either the *least* common denominator of *Baldasar*, or the rule most consistent with the holdings of *Scott* and *Argersinger*, it is true that the Court need not go beyond this narrow interpretation of *Baldasar*'s holding to decide petitioner's case. Petitioner Nichols' misdemeanor conviction was for an offense punishable under Georgia law by a period of imprisonment of ten days to one year. *See* Ga. Code Ann. §40-6-391(c). All five of the Justices

in the majority in *Baldasar* would have ruled that petitioner's prior conviction could not be used for a later sentence enhancement, at least under automatic enhancement statutes.

However, this hybrid rule, while simple, does not address the broader problem posed here and in *Baldasar* : it is unfair, under the rationale of *Argersinger*, to use an uncounseled conviction as a basis for incarceration, regardless of how long a defendant might have served under the misdemeanor statute itself. Petitioner might have served a year under the Georgia statute prohibiting driving while intoxicated, but he did not; he is serving more than twice that amount of time because a conviction that neither he nor the State of Georgia had reason to believe required the guiding hand of counsel turned out to be a trap for the unwary.

3. Holding That A Prior Uncounseled Misdemeanor Conviction Is Invalid For Purposes Of A Subsequent Imposition Of Imprisonment Is Compelled By The Rationales Of *Scott* And *Argersinger*

As most states have found,[11] the explanation for *Baldasar* provided by Justices Marshall, Brennan and Stevens is the most compatible with the holdings of *Argersinger* and *Scott* : uncounseled convictions are too unreliable to justify the severe sanction of imprisonment.[12] In *Baldasar*, the State and the United States had

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[11] *See, e.g., Panenen v. State*, 711 P.2d at 532 (Alaska); *People v. Roybal*, 618 P.2d 1121, 1126 (Colo. 1980)(*en banc*); *State v. Hoglund*, 785 P.2d 1311, 1312 (Haw. 1990); *People v. Finley*, 568 N.E.2d 412, 414 (Ill.App.Ct. 1991); *State v. Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State v. Orr*, 375 N.W.2d at 178 (N.D.); *Pendleton v. Standerfer*, 688 P.2d 68, 70 n.5 (Or. 1985)(*en banc*); *Sargent v. Commonwealth*, 360 S.E.2d 895, 902 (Va.Ct.App. 1987).

[12] As Justice Marshall pointed out, the argument made by the *Bal-*
(continued...)

argued that Baldasar's prior misdemeanor conviction was "valid" under *Scott* because, while Baldasar had been uncounseled, he was not actually imprisoned upon that conviction. *See* Respondent's brief at 12-14; United States brief at 8-9, 11 n.12. Justice Marshall, however, explained that petitioner's prior conviction could not accurately be characterized as "valid" because it was only valid for some, but not other purposes. 446 U.S. at 226. Under the rule of *Scott* and *Argersinger*, he noted, the conviction was "invalid for the purpose of depriving petitioner of his liberty." *Id.* It is simply untrue that an uncounseled misdemeanor conviction is "valid" and therefore may be used for any purpose. *Scott* itself declares that at the time of conviction, it is impossible to know whether the conviction is "valid" without knowing what sentence will be imposed. Such a conviction may not be used as the basis for a sentence of incarceration because, without the presence of counsel, the conviction is simply too unreliable to justify imposition of even one day in prison. To state that the prior conviction was "valid" and therefore could be used as a predicate for a later sentence enhancement is to beg the very question posed in *Baldasar* : is subsequent incarceration one of the purposes for which the earlier conviction is valid, or invalid?

The vast majority of states to have considered the question have accepted the broader reading of *Baldasar*, without complaint or reservation.[13] But, under either

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[12] (...continued)
dasar dissenters that uncounseled misdemeanor convictions are more reliable than felony convictions had been rejected in *Argersinger*, *see* 446 U.S. at 227 n.2. As described in *Baldasar*, *id.*, and in *Argersinger*, 407 U.S. at 33-36, 41, 47, there are reasons to believe that uncounseled misdemeanor convictions, often products of assembly-line justice, may be *less* reliable than uncounseled felony convictions.

[13] *See, e.g., Panenen v. State*, 711 P.2d 528 (Alaska); *Lovell v. State*, 678 (continued...)

reading of *Baldasar*, the fears that led Justice Powell to dissent in that case, *id.* at 230-31, 234-35, have proved to be unfounded. Once the state courts have performed the more difficult task of interpreting what the Court actually said in *Baldasar*, those courts have shown no need or desire for any clearer rule.[14] The states are not prevented from making individual decisions about when to afford counsel and whether to exceed their obligations

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[13] (...continued)
S.W.2d 318 (Ark. 1984); *People v. Roybal*, 618 P.2d 1121 (Colo.); *Krewson v. State*, 552 A.2d 840, 841 (Del. 1980); *State v. Hoglund*, 785 P.2d 1311 (Haw.); *People v. Finley*, 568 N.E.2d 412 (Ill.); *State v. Cooper*, 343 N.W.2d 485 (Iowa); *State v. Oehm*, 680 P.2d 309 (Kan.); *Ratliff v. Commonwealth*, 719 S.W.2d 445 (Ky.Ct.App. 1986); *State v. Dowd*, 478 A.2d 671 (Me. 1984); *People v. Olah*, 298 N.W.2d 422 (Mich.), *cert. denied*, 450 U.S. 957 (1981); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983); *State v. Wilson*, 684 S.W.2d 544, 547 (Mo. Ct.App. 1984); *State v. Laurick*, 575 A.2d 1340, 1347 (N.J. 1990); *State v. Ulibarri*, 632 P.2d 746 (N.M. 1981); *State v. Baldauf*, 586 N.E.2d 237 (Ohio Ct.App. 1990); *Pendleton v. Standerfer*, 688 P.2d 68 (Or.); *Sargent v. Commonwealth*, 360 S.E.2d 895 (Va.); *State v. Armstrong*, 332 S.E.2d 837 (W.Va.); *cf. State v. Wiggins*, 399 So.2d 206 (La. 1981); *In re Kean*, 520 A.2d 1271 (R.I. 1987); *State v. O'Brien*, 666 S.W.2d 484 (Tenn.Crim.App. 1984).

Only a few states share the Fifth Circuit's disdain for *Baldasar*. *See Moore v. State*, 352 S.E.2d 821 (Ga.), *cert. denied*, 484 U.S. 904 (1987); *Sheffield v. City of Pass Christian*, 556 So.2d 1052 (Miss. 1990); *State v. Chance*, 405 S.E.2d 375, 376 (S.C. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1241 (1992); *see also Commonwealth v. Thomas*, 507 A.2d 57 (Pa. 1986), criticized in Joseph R. Podraza, Jr., Note, "Using Prior Uncounseled Convictions to Enhance the Grading and Sentencing of Subsequent Offenses Resulting in Imprisonment: The Pennsylvania Supreme Court's Questionable Reading of *Baldasar v. Illinois*," 60 Temp.L.Q. 331 (1987).

[14] Under Justice Blackmun's six-month rule, there is a simple referent -- what penalty did the misdemeanor statute in question provide? Focusing on the reliability of the prior conviction also yields a simple referent -- does the record of conviction reflect that there was counsel or an explicit waiver of counsel?

under *Scott*,[15] or from pursuing their policies to deter recidivism. The decision in *Baldasar* has already shown itself to be both sound, workable and consistent with the goals of our federalist system. By reaffirming the ruling in *Baldasar* that uncounseled convictions are too unreliable to provide a basis for later incarceration, the Court would not require the states to provide counsel beyond what their economic or administrative circumstances allow, but would protect defendants from unwarranted consequences in those cases where a state had decided not to make the effort necessary to ensure the reliability of a conviction for the most severe sanction.

B. The Federal Sentencing Guidelines Automatically Authorize An Additional Period Of Incarceration As A Direct Result Of Prior Uncounseled Misdemeanor Convictions

Although what happened to petitioner herein was identical to what happened to Baldasar -- he was deprived of two years of liberty as a direct consequence of an earlier uncounseled misdemeanor conviction -- the court below followed the Fifth Circuit's determination to confine *Baldasar* to its facts.[16] The majority in the Sixth Circuit found a convenient distinction in the Second Circuit's observation that, while *Baldasar* involved an enhancement statute that converted a subsequent offense that otherwise would have been a misdemeanor into a felony, the Federal Sentencing Guidelines only provide for sentencing enhancements for what was already a felony. As Judge Jones observed in his opinion below, 979 F.2d at 408, this is truly a distinction without a constitutional difference.

The very purpose of the decision in *Argersinger v. Hamlin* was to reject the notion that the right to counsel can be made to depend on whether a conviction is classified by a state as a misdemeanor or a felony. 407 U.S. 27-39. According to both *Argersinger* and *Scott*, the critical inquiry is simply whether liberty is forfeited. As the Court pointed out in *Argersinger*, except for the unusual situation of the right to a jury trial, no Sixth Amendment guarantee has ever been interpreted to hinge on whether the offense at issue is defined as a felony or as a misdemeanor. 407 U.S. at 27-30. Concern for fairness and reliability of criminal proceedings cannot be made to depend on such irrelevant formalities as whether a state's recidivist laws are found in more than one statute, or whether those laws provide for the prior offense to be introduced at trial rather than at sentencing. Fairness to the individual does not vary according to these circumstances, and fairness to the states requires that the states' different decisions about how to structure their recidivist laws be respected and not used as an excuse for the imposition of varying constitutional obligations.

Once again, comparing the reaction to *Baldasar* in the state and federal courts is instructive. The state courts have shown no little or inclination to distinguish *Baldasar* based on such formalities as the structure of the recidivist or sentencing scheme at issue. The Illinois legislature provided for the sentence enhancement at issue in *Baldasar* in one statute, *see* Ill.Rev.Stat., Ch. 38, para. 16-1(e)(1)1974)(enhancement from a felony to a misdemeanor), which then refers to two other statutes

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[15] Many states in fact, provide counsel in more cases than *Baldasar* or *Scott* would require, on the basis of their own statutes, case law, or state Constitutions. For a few examples, *see Panenen v. State*, 711 P.2d at 532 (Alaska); *People v. Dass*. 589 N.E.2d 1065 (Ill.App.Ct.), *cert. denied*, 602 N.E.2d 462 (Ill. 1992); *State v. Dowd*, 478 A.2d 671 (Me.); *State v. Nordstrom*, 331 N.W.2d at 904 (Minn.); *Rodriguez v. Rosenblatt*, 277 A.2d 216 (N.J. 1971); *State v. Orr*, 375 N.W.2d at 178-79 (N.D.).

[16] 979 F.2d at 416-18. This grudging approach derives from the theory that *Baldasar* had no common rationale. *See supra* note 9.

specifying the penalties for a misdemeanor and for a felony, Ill.Rev.Stat., Ch. 38, §§1005-8-3(a)(1) and 1005-8-1(b)(5)(1975); other state statutes provide automatically escalating penalties for recidivists within a single statute, often within the state's sentencing range for misdemeanors.[17] Such topographical distinctions have not seemed significant to the many state courts to have considered the constitutionality of using uncounseled convictions in applying their state's recidivist statutes.[18]

The United States Sentencing Commission itself concluded that the states' formal categorizations of their offenses are simply too varied and idiosyncratic to provide a basis even for later sentencing decisions. Therefore, in prescribing how prior criminal history is to be evaluated for the purposes of sentencing, the Commission, like the Court, decided that the amount of incarceration actually imposed is the only realistic measure of the seriousness of an offense, *see* U.S.S.G. §4A1.1, comment.

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[17] The Georgia statute that provided the basis for petitioner's 1983 conviction is a good example of escalating penalties within what the state defines as a misdemeanor range. *See* Ga. Code Ann. §40-6-391 (1983). Under the current statute, first and second offenses are defined as misdemeanors, and a third offense as a "high and aggravated misdemeanor," again with escalating penalties. Ga. Code Ann. §40-6-391 (1992).

See also Wis. Stat. §343.44 (1989-90), discussed in *State v. Baker*, 485 N.W.2d 237, 239 (Wis. 1992), where within one statute the state provides for progressive minimum and maximum terms of imprisonment, all within the same offense level, for repeated instances of driving while intoxicated.

[18] *See, e.g., State v. Ulibarri*, 632 P.2d at 747 ("We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense"); *accord State v. O'Brien*, 666 S.W.2d at 485.

Petitioner's prior conviction, like Baldasar's, automatically moved him from one sentencing range to another. There is no significance to the fact that the Federal Sentencing Guidelines set up ranges within a single statute. The significant feature of the Federal Sentencing Guidelines is that, like the enhancement statute at issue in *Baldasar*, the sentencing authority's decision about how to treat the prior conviction is not discretionary. Consequences flow from the existence of the conviction, and not from a sentencing court's discretionary decision about the seriousness of the previous offense, or the conduct underlying that offense. In effect, "the Guidelines act as a recidivist statute applicable to all federal crimes."[19] Whether or not *Baldasar* would prohibit use of a prior uncounseled misdemeanor conviction as a factor at the sentencing phase in a context where sentencing is discretionary, *cf. United States v. Tucker*, 404 U.S. 443 (1972), is a question the Court need not address in this case. In its haste to distinguish *Baldasar*, however, the Fifth Circuit never considered the nature of the calculation of criminal history under the Federal Sentencing Guidelines, which is far closer to the automatic decision made under the enhancement statute in *Baldasar* than to a discretionary sentencing decision.[20]

In the Sentencing Reform Act of 1984, Congress provided that a court "*shall impose* a sentence of the kind, and within the range [set forth in the Guidelines], unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

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[19] D. Brian King, "Sentence Enhancement Based on Unconstitutional Prior Convictions," 64 N.Y.U.L.Rev. 1373, 1375 (1989).

[20] In *Eckford* the Fifth Circuit summarily rejected the argument that its prior case law distinguishing *Baldasar*, which had evolved before the Federal Sentencing Guidelines became effective, should be reevaluated in this new context. *See* 910 F.2d at 220 n.9.

adequately taken into consideration by the Sentencing Commission." 18 U.S.C. §3553(b)(emphasis added). As several members of this Court have already concluded, this strong prescription that sentencing will presumptively fall within the applicable range is such a clear limitation on discretionary decisionmaking as to create a liberty interest within the meaning of the Due Process Clause. *See Burns v. United States*, 111 S.Ct. at 2191-92 (Souter, J., dissenting, joined by White and O'Connor, JJ.).[21] Under the Guidelines, a defendant has a protectible expectation that he will receive a sentence no higher than the applicable range on the Sentencing Table, an expectation that can be defeated only if the sentencing judge can justify a departure under U.S.S.G. §5K2.0.

The distinction between discretionary and non-discretionary decisions, familiar from due process cases like *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 11-12 (1979), and *Meachum v. Fano*, 427 U.S. 215 (1976), provides one clear and logical description of the scope of *Baldasar*. In enhancement decisions where an imposition of incarceration is not due to a discretionary decision, but to an automatic scheme under which the imposition of a higher sentencing range is a *direct* consequence of the prior conviction, use of an uncounseled conviction is impermissible because of that conviction's presumptive unreliability.[22]

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[21] Justice Rehnquist, who dissented in *Burns*, did not join this part of Justice Souter's opinion. The Justices in the majority did not express any opinion on this issue, having decided the case on statutory grounds which precluded the need for any constitutional analysis. *See id.*

[22] Justice Marshall's opinion in *Baldasar* stressed that the sentencing enhancement was a "direct consequence" and "solely because" of the prior conviction, 446 U.S. at 228. Many courts have identified the *Baldasar* rationale as resting upon whether or not the sentence enhancement is "automatic" or "direct." *See, e.g., United States v.*
(continued...)

Under these circumstances, there is no meaningful way to distinguish what *Scott* disallowed -- the severe sanction of a substantial period of imprisonment flowing from the conviction of an individual who might have been innocent, or who might have regarded the payment of a modest fine as insufficient reason to contest guilt.

II. PETITIONER WAS DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW BY THE AUTOMATIC IMPOSITION OF AN ADDITIONAL PERIOD OF IMPRISONMENT UNDER THE FEDERAL SENTENCING GUIDELINES

In *Baldasar*, both the prior and the enhanced convictions had taken place in the same jurisdiction, so the Court did not need to explain whether the violation of Baldasar's rights lay in the subsequent use of the conviction, or in the failure to afford counsel on the first conviction. Because there are two different jurisdictions involved in petitioner's case, the Court has an opportunity to explain which jurisdiction has actually violated which of petitioner's constitutional rights.

Under the theory of four Justices in the *Baldasar* majority, it is arguable whether or not the State of Georgia violated petitioner's constitutional rights in this case. Georgia made only the limited use of the uncounseled misdemeanor conviction that *Scott* and *Baldasar* allow, and therefore had no obligation to provide petitioner Nichols with counsel or to ensure that he knowingly and intelligently waived his right to counsel.[23] The United

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[22] (...continued)
Hookano, 957 F.2d 714, 716 (9th Cir. 1992); *Moore v. Jarvis*, 885 F.2d at 1571-73; *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988); *State v. Dowd*, 478 A.2d at 678 ("direct" result).

[23] It could be argued that Georgia violated petitioner's Sixth and Four-
(continued...)

States certainly violated petitioner's rights by impermissibly using this flimsy conviction as the basis for more than two years' incarceration.

On the other hand, under Justice Blackmun's interpretation of the right to counsel, as expressed in *Baldasar* and *Scott*, it would be clear that Georgia denied petitioner his Sixth and Fourteenth Amendment rights by failing to afford him counsel or seek a formal waiver of counsel in a prosecution for a misdemeanor punishable by more than six months. Under either approach, petitioner was denied his constitutional right not to be incarcerated on the basis of an uncounseled conviction. But if the Court does not wish to reexamine the ruling in *Scott*, the Court can take this opportunity to clarify that it was the United States that violated petitioner's rights by using a conviction of only conditional validity for precisely the same deprivation of liberty that *Scott* prohibited. This can be described as either a Sixth Amendment or a due process violation.[24]

Scott accommodated federalism concerns and the states' economic and administrative interests by offering the states the option of avoiding the expense of assigning counsel for every petty offense, so long as the states are

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[23] (...continued)
teenth Amendment right to counsel by supplying a deceptive, unreliable conviction that was available for use by other jurisdictions.

[24] The action could be described as a violation of petitioner's Sixth Amendment right on the theory that any improper use of an unreliable, uncounseled conviction is a new violation of the right to counsel. *Cf. Burgett v., Texas*, 389 U.S. at 115. If the Court agrees that, under *Baldasar* and *Scott*, the later use of an uncounseled conviction is a denial of the Sixth Amendment right to counsel, the Court need go no further. If the Court believes that the Sixth Amendment is not violated in this case, or does not wish to reach that issue, the Due Process Clause provides an alternate method of analyzing petitioner's claim.

willing to forego imprisoning those defendants who remain uncounseled. *Baldasar* provides that the states may not then renege on the bargain they have made by using the same unreliable conviction as a predicate for imprisonment at a later date. *See Moore v. Jarvis*, 885 F.2d at 1572. Under *Baldasar*, if a state wishes to preserve the opportunity to use a misdemeanor conviction as a predicate, that state must treat the misdemeanor seriously enough to ensure its reliability -- by affording counsel. It is the state's choice whether to guarantee a reliable conviction; if the state has chosen to treat the offense as a petty matter, not requiring even the "guiding hand of counsel," it is unfair for another jurisdiction to treat that conviction as sufficiently weighty to provide a basis for a two-year loss of liberty.

The price of the accommodation in *Scott* is the conceptual difficulty that arises from creating a constitutional rule under which it is impossible to evaluate the constitutionality of a state action at the time that action is taken. *Scott* suggests that a violation of the right to counsel under the Sixth and Fourteenth Amendments springs into being when the state attempts to sentence an uncounseled defendant to prison. *Baldasar* confirms that a renewed violation of the right to counsel occurs if a jurisdiction later uses that conviction impermissibly. If the Court wishes to avoid paradox and clarify *Baldasar*, one simple method of doing so is to explain the violation in a case like Baldasar's or petitioner's as occurring upon the *use* of the conviction, and perhaps as based on a due process rationale.[25]

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[25] The *Baldasar* dissenters complained that the rule in *Baldasar* is impractical because a court trying a misdemeanor cannot predict whether a conviction will be wanted for use as a predicate at a later date. 446 U.S. 231. Once it is clear that the state is not being accused of any unconstitutionality for being unable to make such predictions, the result no longer seems anomalous. The state is not asked

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As described above, some members of this Court have already correctly concluded that the Federal Sentencing Guidelines create a liberty interest and therefore entitle a federal defendant being sentenced to due process of law. *See Burns*, 111 S.Ct. 2182. The Court must then balance the factors listed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in order to decide what process is due. The factors *Mathews* lists -- the nature of the interest petitioner has at stake, the increment to reliability of the decision if the procedure advocated is adopted, and the governmental interests, including the fiscal and administrative burdens the advocated procedure would entail -- overlap the considerations the Court has already discussed in its Sixth and Fourteenth Amendment analysis in *Argersinger* and *Baldasar*. The petitioner has at stake two years of freedom, a potential deprivation the Constitution treats so seriously that the entire panoply of rights, including counsel and the right to a jury trial, are guaranteed any individual who faces so extensive a period of imprisonment. Reliability is as critical here as under Sixth Amendment analysis. The deprivation of petitioner's freedom is being predicated on a decision that the state did not take seriously enough to afford counsel or seek a formal waiver of counsel. It is not unimaginable that an innocent person would pay a fine for a charged traffic offense rather than undergoing the expense and ordeal of a trial. Finally, the burden on the states, as described above, will not be increased if the Court adheres to or even expands the *Baldasar* rule.[26] The United States may still sentence

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[25] (...continued)
to predict, but to decide whether to invest in the future reliability of its decisions.

[26] The *Baldasar* dissenters rejected the majority position because they focused myopically only on this factor. As the *Mathews* balancing test declares, the exigencies of state misdemeanor prosecutions are one (continued...)

petitioner to 210 months, based on his instant conviction and other criminal history. The United States does not have any legitimate interest in enhancing a sentence (in this case, by 25 months) based on prior criminal history if that history is unreliable.

Under Justice Blackmun's rule, an added burden would be imposed on some states which would be required to extend the right to counsel to certain misdemeanants, but the United States would then be able to use those prior misdemeanor convictions to enhance sentences.[27] If some states decline to shoulder that burden voluntarily, the United States must respect their decisions and not expect to be exempted from the requirement that unreliable convictions not form the basis for incarceration.

In *Townsend v. Burke*, 334 U.S. 736, this Court held that defendants have a right under the Due Process Clause to be sentenced on the basis of accurate and reliable information. Petitioner's uncounseled *nolo contendere* plea to the 1983 misdemeanor charge provides no such assurance in this case.

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[26] (...continued)
factor to be considered, but not to the exclusion of the defendant's interest in his own liberty, and the propriety of the federal government action, which actually deprived petitioner of his liberty.

[27] As noted above, *see supra* note 15, a number of states already provide counsel in circumstances beyond what *Scott* requires; convictions from those jurisdictions are sufficiently reliable to be used by the United States or other jurisdictions as predicate offenses.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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